BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ADRANETTE JONES	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,036,753
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 1, 2009, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on January 6, 2010. Frederick J. Patton, II, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and the State Self Insurance Fund (respondent).

The Administrative Law Judge (ALJ) found that claimant had a 2 percent permanent partial impairment to the right lower extremity at the level of the leg based on the ratings of Dr. Peter Bieri and Dr. Don Miskew. The ALJ further found that K.S.A. 44-510e(a) limits payment of temporary partial benefits to nonscheduled injuries and, accordingly, found that respondent was entitled to a credit for temporary partial benefits paid to claimant in the amount of $1,189.70.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's finding that she had a 2 percent permanent partial impairment to her right lower extremity. Claimant argues that Dr. Daniel Zimmerman was the only rating physician who properly rated claimant's meniscal tear and permanent aggravation of her preexisting arthritis and chondromalacia. Claimant further argues that

respondent's payment of temporary partial benefits was in the nature of a gift; therefore, there is no statutory authority for respondent to be allowed a credit for the same.

Respondent asserts that Drs. Bieri and Miskew found that claimant's degenerative joint disease was preexisting and unrelated to the work accident and, therefore, the ALJ's finding that claimant had a 2 percent permanent partial impairment to her right lower extremity should be affirmed.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) Is respondent entitled to a credit for temporary partial benefits paid to claimant?

FINDINGS OF FACT

Claimant worked for KNI for almost 20 years as an advocate for residents. Her job included passing medications, showering residents, cooking for residents, and feeding residents.

On July 31, 2007, claimant was trying to redirect a resident who was trying to leave the lunchroom when she slipped on some food. The fall injured her right knee. Claimant went to St. Francis and from there was referred to an orthopedic specialist in Topeka. Claimant said that did not work out, and she was subsequently sent to see Dr. Miskew, who told her she had a torn meniscus. Claimant had surgery to repair the tear on September 28, 2007. Claimant is back to work now performing the same job as before. She continues to have problems with her right knee. She said it locks and gives out, and she has pain and swelling. She did not have those problems before July 31, 2007.

Claimant was off work from August 1, 2007, through April 14, 2008, during which time she was paid temporary total disability benefits. Dr. Miskew then released her to work part time. Claimant had used up all her vacation and sick leave through respondent. She said she could not afford to return to work and earn only part-time wages. Respondent at first said it would not pay for temporary partial benefits, but later finally agreed that in her case, it would pay the temporary partial benefits. Claimant was paid temporary partial benefits through May 31, 2008, after which she returned to work full time.

Dr. Don Miskew, a board certified orthopedic surgeon, treated claimant at respondent's request. He first saw claimant on September 19, 2007, approximately six weeks after her original injury. An MRI had been done previously which showed she had a tear in the medial meniscus in her right knee. She also had some mild joint swelling and some bursitis. After examining claimant, Dr. Miskew diagnosed her with a torn medial meniscus and recommended arthroscopic surgery, which was performed on September 27, 2007. At the time of claimant's surgery, she had significant chondromalacia

of the medial femoral condyle. Dr. Miskew said that chondromalacia takes a long time to develop, and it preexisted her injury.

Claimant had physical therapy post-operatively for several months. Dr. Miskew saw her on May 21, 2008. At that time, as compared to her opposite knee, claimant had full range of motion in her right knee. However, she could only flex both knees to about 110 degrees, which is not a normal flexion, which he said was because she is a large woman. He recommended that she consider lap band surgery because he felt in the future she could end up with severe arthritis of her knees. Nevertheless, he found she was at maximum medical improvement and dismissed her from care.

Dr. Miskew examined claimant the last time on December 8, 2008. Claimant told him that since she had last been seen in May, she was having some aching pain in her knee, and the knee was starting to give out and swell. Dr. Miskew was not surprised that claimant was again complaining of knee pain. At the time of her surgery, her chondromalacia was already developing. Dr. Miskew also stated that claimant's x-rays showed that the medial or inside part of her knee joint was narrowing. He attributed the narrowing to her weight problem. Dr. Miskew said claimant had a progressive arthritic condition developing. He opined that her arthritic condition was slightly contributed to by her previous torn meniscus but mainly it was caused by her obesity. He continued to recommend lap band surgery. On examination, he did not find claimant to have flexion contracture.

Based on the AMA *Guides*,[1] Dr. Miskew rated claimant as having a 2 percent permanent partial impairment of the right lower extremity secondary to a right partial medial meniscectomy.

Dr. Daniel Zimmerman, a board certified independent medical examiner, evaluated claimant on September 17, 2008, at the request of claimant's attorney. Claimant told Dr. Zimmerman that on July 31, 2007, she slipped at work and heard a pop in her right knee. She had an arthroscopic right partial medial meniscectomy on September 27, 2007.

Claimant told Dr. Zimmerman that she continues to have pain in her right knee and feels as if it gives out frequently. She hears a popping sound with range of motion activities. She has difficulty getting up from a chair and going up and down stairs. She is not able to stoop, squat or crawl, and was able to do those activities at least partially before the accident. She has an aching pain that affects her ability to sleep throughout the night.

Upon examination, Dr. Zimmerman found that she had range of motion restrictions affecting the right knee. Utilizing the AMA *Guides*, Dr. Zimmerman rated claimant as

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

having a 20 percent permanent partial impairment to the right lower extremity at the level of the knee due to a right knee medial meniscus tear and permanent aggravation of chondromalacia. He opined she had a moderate impairment because she had a flexion contracture, which he based on her range of motion measurements. He believes her flexion contracture was caused by soft tissue damage or scarring associated with her knee injury and resulting surgery. Dr. Zimmerman said that claimant's obesity would have no effect on flexion or extension.

Dr. Zimmerman believed that Dr. Miskew failed to find claimant's loss of extension because he did not use a goniometer to measure claimant's range of motion. Dr. Zimmerman discounted Dr. Bieri's opinion that he could not do range of motion measurements on claimant, adding that Dr. Bieri should have documented his findings.

Claimant was seen by Dr. Peter Bieri on March 19, 2009, at the request of the ALJ for an independent medical examination (IME). She gave him a history of her accident and treatment, including surgery. Claimant complained of pain involving the medial and anterior aspect of the right knee, with some instability. She said she had difficulty climbing and descending stairs. Upon examination, Dr. Bieri found claimant had a slightly antalgic gait. She had slight to moderate tenderness to palpation along the anterior and medial joint line, with some crepitance with active and passive range of motion. Dr. Bieri found her active range of motion was reduced, but valid measurements were not obtainable.

Dr. Bieri found that claimant's diagnosis of a partial tear of the medial meniscus and her treatment to date were reasonable, appropriate and consistent. Based on the AMA *Guides*, he rated her impairment at 2 percent to the right lower extremity for residuals of partial medial meniscectomy.

Claimant told Dr. Bieri she had previously been seen by an orthopedist in 2006 for right knee pain. At that time, x-rays revealed she had degenerative joint disease. Treatment included a cortisone injection. At the time, claimant's weight was measured variously between 380 and 400+ pounds. Dr. Bieri stated that claimant's degenerative joint disease involved the patellofemoral joint and any symptomatology of degenerative joint disease is not attributable to the injury in question.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[2] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[3] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[4]

K.S.A. 44-510(d) states in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> (16) For the loss of a leg, 200 weeks.
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> (23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.
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> (b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total

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[2] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[3] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[4] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510f(b) states:

> (b) If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

ANALYSIS

Based upon the expert medical opinions of Drs. Miskew and Bieri, the Board finds that claimant suffered a 2 percent loss of use of her left lower extremity due to the accident at work on July 31, 2007.

While the Board is mindful of the contrary opinion of Dr. Zimmerman, we do not find claimant's arthritis and chondromalacia conditions to have been caused, aggravated or accelerated by the work-related accident. Instead, these were preexisting conditions that have progressed as a normal result of claimant's body habitus and the natural aging process.

In this instance, the ALJ determined that the opinions of Dr. Miskew and Dr. Bieri were the more credible and persuasive based in part upon their being the treating and court-ordered IME physicians, respectively. The Board agrees with the ALJ and affirms her decision as to the nature and extent of claimant's disability.

Unlike in the general body disability statute, K.S.A. 44-510e, the scheduled injury statute, K.S.A. 44-510d, does not provide for the payment of temporary partial disability compensation.[5] K.S.A. 44-510d does provide for temporary total disability, but temporary total disability and temporary partial disability are not the same. The Board will not read

[5] See *Antwi v. C-E Industrial Group*, 5 Kan. App. 2d 53, 61, 612 P.2d 656, *aff'd* 228 Kan. 692, 619 P.2d 812 (1980).

into the statute something that is not there.[6] As this claim is solely for a scheduled injury, claimant is not entitled to an award of temporary partial disability compensation.[7] Likewise, there is no statutory provision for respondent to receive a credit or offset for the temporary partial disability compensation it voluntarily agreed to pay to claimant upon her return to working part-time for respondent. The Board does not consider those payments to be the equivalent of unpaid wages because they were paid as temporary partial disability compensation under workers compensation and not as wages. Also, the agreement was with the insurance fund and not between claimant and her employer. Accordingly, K.S.A. 44-510f(b) does not apply.

CONCLUSION

(1) As a result of her work-related accident, claimant has a 2 percent permanent loss of use to her leg.

(2) Respondent is not entitled to a reduction of the permanent partial disability award for the temporary partial disability benefits it paid to claimant.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated October 1, 2009, is modified to find claimant has a 2 percent permanent partial disability to her right lower extremity at the level of the leg with no reduction of the award for temporary partial benefits respondent paid to claimant.

Claimant is entitled to 36.72 weeks of temporary total disability compensation at the rate of $400.83 per week in the amount of $14,718.48 followed by 3.27 weeks of permanent partial disability compensation, at the rate of $400.83 per week, in the amount of $1,310.71 for a 2 percent loss of use of the right leg, making a total award of $16,029.19.

IT IS SO ORDERED.

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[6] See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[7] See *Blocker v. City of Topeka*, No. 1,002,440, 2004 WL 2579713 (Kan. WCAB Oct. 14, 2004); *Castro v. Francis Casing Crew, Inc.*, No. 1,015,853, 2004 WL 2046743 (Kan. WCAB Aug. 6, 2004); *Ledbetter v. Constar Plastics*, No. 205,252, 1996 WL 670520 (Kan. WCAB Oct. 2, 1996).

Dated this _____ day of January, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Frederick J. Patton, II, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and the State Self Insurance Fund
Rebecca A. Sanders, Administrative Law Judge